No. 96-1133

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondent does not dispute that the principle embraced by the Court of Appeals for the Armed Forces in this case, if correct, would invalidate a rule of evidence that is the law in numerous States. As we have explained (Pet. 12-13), many States follow the "traditional rule * * * that polygraph results are per se inadmissible when offered by either party, either as to substantive evidence or as related to the credibility of the witness." *State* v. *Miller*, 522 A.2d 249, 260 (Conn. 1987). Petitioner does not explain, nor is it apparent, why the rejection of that "traditional rule" on constitutional grounds is unworthy of this Court's review.

Respondent suggests (Br. in Opp. 13-14) that the decision below is consistent with the views of other federal courts of appeals, because "every Federal Circuit save two allows the admission of polygraph evidence." *Id.* at 13. That contention is flawed for two reasons. First, the majority of the federal courts of appeals have long adhered to the traditional rule that excludes polygraph evidence in all circumstances. See Pet. 13. Some courts have reassessed whether that conclusion reflects a correct interpretation of Rule 702 of the Federal Rules of Evidence in light of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but even those courts have not suggested that *the Constitution* forbids a categorical rule that bars such evidence. Second, and more fundamentally, those circuits that *have* considered the constitutional validity of the traditional rule that excludes such evidence have disagreed with the conclusion reached by the court below. See Pet. 13-14. That disagreement among appellate courts in the federal system is strong additional reason for this Court's review.

2. Respondent argues that review should be denied because the decision below is correct. See Br. in Opp. 7-13. As respondent reads this Court's Fifth and Sixth Amendment cases, exclusionary rules of evidence may not be predicated on reasoning that does not hold true "in all cases, under all circumstances" (*id.* at 5), and accordingly the accused is always entitled to show that his particular case may not come within the rationale that justifies a general exclusionary rule. See Pet. 12-13. That broad view of the Constitution, however, has never been accepted by this Court. See, *e.g.*, *Michigan* v. *Lucas*, 500 U.S. 145, 149 (1991) (the fact that evidentiary rules "operate[] to prevent a criminal defendant from presenting relevant evidence * * * does not necessarily render [them] unconstitutional" under the Sixth Amendment). Indeed, that broad view could effectively preclude application in criminal cases of many exclusionary rules of evidence the validity of which has never before been doubted. Compare *Montana* v. *Egelhoff*, 116 S. Ct. 2013, 2017 (1996) (plurality opinion) (categorical rules of evidence generally permissible); *id.* at 2029 (O'Connor, J., dissenting) (categorical exclusionary rules may be suspect if adopted "for the express purpose of improving the State's likelihood of winning a conviction against a certain type of defendant").

As we have explained (Pet. 15-16), the correct Sixth Amendment inquiry in this context is whether the categorical exclusion of polygraph evidence is arbitrary or disproportionate to the legitimate interests served by Rule 707. Contrary to respondent's contention (Br. in Opp. 11), the exclusion of expert testimony that lacks general acceptance within the scientific community is not "arbitrary" merely because it is possible that such testimony may some day gain widespread support among scientists. To the contrary, until this Court decided *Daubert* in 1993, a "'general acceptance' test ha[d] been the dominant standard for determining the admissibility of novel scientific evidence at trial" and was "followed by a majority of courts." *Daubert*, 509 U.S. at 585. While *Daubert* concluded that the Federal Rules of Evidence replaced that "general acceptance" test with a more liberal standard, neither *Daubert* nor any other decision of this Court has ever embraced respondent's suggestion that the traditional common law rule in this area is *forbidden* by the Constitution.

3. Especially in the military context, respondent cannot sustain his burden of demonstrating that a rule categorically excluding polygraph evidence is disproportionate to the legitimate government interests in avoiding confusion and wasteful collateral litigation on matters of scientific validity, and in preserving to the factfinders their historical role of assessing credibility on the basis of traditional, easily understood criteria.

There is no merit to respondent's suggestion that this Court should "give great deference" (Br. in Opp. 17) to the court of appeals' view that its holding will not unreasonably burden the armed services, because of that court's "unique role * * * in the military system." *Id.* at 16. The court of appeals did not rest its holding on any appraisal of factors that are unique to the military system, but instead based its holding on an interpretation of the Constitution. That interpretation does not merit this Court's deference. Indeed, the deference that is appropriate in this case is due to the judgment of the Congress that the President should prescribe rules of evidence for military trials, see 10 U.S.C. 836(a), and to the President's decision to invoke that statutory authority, and his own inherent authority as Commander in Chief under the Constitution, see Exec. Order No. 12,767, 3 C.F.R. 334, 339-340 (1991 comp.), to prohibit the introduction of polygraph evidence in court martial proceedings.* A court of appeals' decision invalidating on

* Respondent suggests in passing (Br. in Opp. 14) that Rule 707 is not authorized by Article 36(a) of the Uniform Code of Military Justice, 10 U.S.C. 836(a), because a per se rule excluding polygraph evidence is not a "generally recognized" rule of evidence. The Court of Appeals for the Armed Forces refused to pass on that argument, because respondent did not brief or argue it. See Pet. App. 5a-6a. That argument accordingly is no longer open to respondent. See, *e.g.*, *Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1993) (per curiam) (noting that this Court ordinarily will not pass on a claim that was neither pressed nor passed on below); *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (same).

constitutional grounds the judgment of the political branches in this sensitive area plainly warrants this Court's attention.

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For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

APRIL 1997